UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Christopher Polansky

v. Civil No. 12-cv-105-PB

New Hampshire Department of Corrections; Warden Richard Gerry; Jon Fouts; Celia Englander, MD; Bernice Campbell; and Helen Hanks

REPORT AND RECOMMENDATION

Christopher Polansky, a wheelchair-bound inmate in the New Hampshire State Prison ("NHSP" or "the prison"), has sued six defendants[1] in nine counts. His claims arise out of three aspects of his incarceration: (1) the prison's alleged failure to provide him with medically necessary physical therapy; (2) its alleged failure to install an alarm in a shower used by inmates with disabilities; and (3) the suspension of contact visits with members of his family. Before me for a report and recommendation are: (1) a motion for summary judgment filed by the New Hampshire Department of Corrections ("DOC"), Warden

[1] The defendant identified in the court's docket and in the caption of this order as "Jon Fouts" is actually Major John Fouts. The defendant identified in the court's docket and in the caption of this order as "Bernice Campbell" is actually Bernadette Campbell.

Richard Gerry, Maj. John Fouts, Bernadette Campbell, and Helen Hanks (collectively "DOC defendants"); and (2) a pleading filed by Dr. Celia Englander titled "Motion for Summary Judgment and Joinder in Codefendant's Memorandum of Law, and Supporting Documentation," doc. no. 92. Polansky objects to both motions. For the reasons that follow, I recommend that both summary-judgment motions be granted.

Summary Judgment Standard

"Summary judgment is warranted where 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" McGair v. Am. Bankers Ins. Co. of Fla., 693 F.3d 94, 99 (1st Cir. 2012) (quoting Fed. R. Civ. P. 56(a); citing Rosciti v. Ins. Co. of Penn., 659 F.3d 92, 96 (1st Cir. 2011)). "In determining whether a genuine issue of material fact exists, [the court] construe[s] the evidence in the light most favorable to the non-moving party and make[s] all reasonable inferences in that party's favor." Markel Am. Ins. Co. v. Díaz-Santiago, 674 F.3d 21, 30 (1st Cir. 2011) (citing Flowers v. Fiore, 359 F.3d 24, 29 (1st Cir. 2004)).

"The object of summary judgment is to 'pierce the boilerplate of the pleadings and assay the parties' proof in order to determine whether trial is actually required.'" Dávila

v. Corporación de P.R. para la Diffusión Pública, 498 F.3d 9, 12 (1st Cir. 2007) (quoting Acosta v. Ames Dep't Stores, Inc., 386 F.3d 5, 7 (1st Cir. 2004)). "[T]he court's task is not to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Noonan v. Staples, Inc., 556 F.3d 20, 25 (1st Cir. 2009) (citations and internal quotation marks omitted).

"The nonmovant may defeat a summary judgment motion by demonstrating, through submissions of evidentiary quality, that a trialworthy issue persists." Sánchez-Rodríguez v. AT&T Mobility P.R., Inc., 673 F.3d 1, 9 (1st Cir. 2012) (quoting Iverson v. City of Boston, 452 F.3d 94, 98 (1st Cir. 2006)). "However, 'a conglomeration of conclusory allegations, improbable inferences, and unsupported speculation is insufficient to discharge the nonmovant's burden.'" Sánchez-Rodríguez, 673 F.3d at 9 (quoting DePoutot v. Raffaelly, 424 F.3d 112, 117 (1st Cir. 2005)). "Rather, the party seeking to avoid summary judgment must be able to point to specific, competent evidence to support his [or her] claim." Sánchez-Rodríguez, 673 F.3d at 9 (quoting Soto-Ocasio v. Fed. Ex. Corp., 150 F.3d 14, 18 (1st Cir. 1998)) (internal quotation marks omitted).

Background

The DOC defendants have produced eight affidavits to back up the statement of material facts in the memorandum of law supporting their motion for summary judgment, see LR 7.2(b)(1), and several of the affiants have attached exhibits to their statements. Polansky has produced a single submission of evidentiary quality. That submission, document no. 105-1, is an affidavit in the form of an autobiography that addresses none of the facts pertinent to his claims in this case. Accordingly, the court deems all of defendants' properly supported statements of fact to be admitted. See LR 7.2(b)(2). That said, the court turns to the relevant factual background.

A. Physical Therapy

Polansky is a paraplegic. He entered the NHSP in July of 2001. Since then, he has received a variety of treatment and services from Campbell, a physical therapist who serves as the Director of Rehab Services at the prison. In August of 2001, Campbell performed an initial evaluation of Polansky and developed a treatment plan to increase his mobility, strength, and overall functioning. In August of 2001 and again in January of 2002, NHSP medical personnel gave Polansky prescriptions for skilled physical therapy. Campbell provided both courses of

therapy. She saw Polansky two or three times a week from August of 2001 through October of that year, and saw him two or three times a week from late January of 2002 through May of that year.

At the conclusion of Polansky's second course of physical therapy, Campbell attempted to shift him to a program of exercise he could perform on his own. He was only sporadically compliant, and he rejected Campbell's attempts to assist him in maintaining a regimen of self-exercise. Instead, he demanded skilled physical therapy, and he continues to have little faith in the efficacy of exercising on his own. In 2005/2006, after a series of self-injurious acts, Polansky was again prescribed physical therapy, but he refused to participate. In 2011, after visitation for inmates in wheelchairs was limited to non-contact visits, for security reasons, Campbell worked with Polansky to help him develop the physical ability to be "stripped out," which is a necessary prerequisite for contact visits.

B. Shower Alarm

In his complaint, Polansky alleges that on several occasions, he fell to the floor while showering and had to wait "some time" before he was rescued by members of the prison staff. Cindy Domenici, a nurse coordinator/case manager in DOC's Division of Health Services, has testified by affidavit

that to her knowledge, at all times relevant to this action, Polansky was assisted in the shower, one-on-one, by either a volunteer or a member of the prison medical staff, and that if he was ever left alone, it was for a "minimal time while he did his personal care." Defs.' Mot. Summ. J., Domenici Aff. (doc. no. 84-7) ¶ 3. Domenici has further testified that as of January of 2013, Polansky: (1) "had a completely assisted shower/tub and bathes in the presence [of] and with the assistance of a staff member and a volunteer [and] is not left alone while bathing," id. ¶ 4; and (2) has been provided with "a UMP Personal Economy Pull String, a portable call device . . . [he] can pull . . . if he needs to call for assistance," id.

C. DOC's Grievance Process

During Polansky's incarceration, inmates in the NHSP were subject to a Policy and Procedure Directive that required them, if they wanted to complain about prison conditions, to utilize a three-step grievance process consisting of: (1) an inmate request slip directed to the appropriate staff member and submitted "within 30 calendar days of the date on which the event complained of occurred," Defs.' Mot. Summ. J., Pitman Aff., Ex. B (doc. no. 84-13), at 2; (2) a grievance form "directed to the Warden of the facility in which the inmate is

currently housed" and "received within 30 calendar days from the date of the response to the request slip," id. at 3; and (3) a grievance form directed to the Commissioner of the Department of Corrections and received "within 30 calendar days of the date of the response by the Warden," id. at 4. As for the mechanics of the forms required by the grievance process:

> Inmate request slips . . . are a three-part form, which consists of a white, yellow and pink carbonless copy. The staff member/responder keeps the pink copy and the inmate keeps the yellow copy. The white copy is forwarded to offender records after the inmate signs the bottom of the form.
>
> Grievances . . . are a three-part form, which consists of a white, yellow and pink carbonless copy. The staff member/responder receives the yellow copy and the inmate receives the pink copy. The white copy is forwarded to offender records after the inmate signs the bottom of the form.

Defs.' Mot. Summ. J., Wolcott Aff. (doc. no. 84-14) ¶¶ 2-3.

D. Polansky's Use of the DOC Grievance Process

Polansky used the DOC grievance process to address his concerns over both physical therapy and the lack of a shower alarm. In this section, the court describes in turn Polansky's efforts to grieve each of those two issues.

Physical therapy. Polansky has filed three inmate request slips that refer to physical therapy. On March 4, 2011, he wrote to Campbell:

> I figure since they decided that they can't find the time to all sit down at once to medically parole me, that while I'm here, I might as well start receiving the physical therapy I am legally due. I feel that if we start a program now, I should have a full range of motion by the time I make regular parole. I have lost 35 pounds recently and plan to lose another 30+ ASAP, which will aid me in my endeavor for this exercise. Please contact me at your leisure to set up an appointment for this agenda please.

Defs.' Mot. Summ. J., Pitman Aff., Ex. A (doc. no. 84-12), at 5. That request slip includes a response from Campbell, dated March 14: "Discussed/Addressed." Id. Polansky did not follow up on Campbell's response by filing a grievance with the Warden concerning physical therapy within thirty days from March 14. In an inmate request slip dated August 12, 2011, Polansky asked Campbell for: (1) a stiffer wedge pillow he could use to prevent pressure on his coccyx while he was sleeping; and (2) a waterproof pad for his shower chair. See Compl., Attach. 1 (doc. no. 1-1), at 13. He also asked: "is there any type of surgical or medically effective way to become physically adaptable again by removing bone spurs etc. etc. so that I can ultimately receive physical and/or orthopedic therapy?" Id. While the August 12 request slip mentions physical therapy, it is a pretty big stretch to read that slip as actually requesting physical therapy. Donna Timulty responded to Polansky's request slip on September 5: "You have spoken to Bernie [Campbell] about

the P.T." Id. Polansky did not follow up on Timulty's response by filing a grievance with the Warden concerning physical therapy within thirty days from September 5.

Finally, on November 22, 2011, Polansky directed the following request to Halyo Zadoretzky, who appears to be a provider of mental-health services at the prison:

> Halya, a few months ago when I attempted to participate in your group "Clinical Depression," as you remember, I could not because I could not "fit" into the mini elevator that would have allowed me passage to the area where you held your group sessions and the reason for that was that I was denied both physical and orthopedic therapies and range of motion so my hips and my knees are all locked into fixed immovable and permanently fixed positions. Now you mentioned possibly bringing that group somehow to me so I can participate in it. Will that be any time in the near future?

Compl., Attach. 1 (doc. no. 1-1), at 32. As with the August 12 request slip, the November 22 slip is difficult to construe as a request for physical therapy. Zadoretzky's reply, which was dated November 29, 2011, did not mention physical therapy. See id. Polansky did not follow up on Zadoretzky's response by filing a grievance with the Warden concerning physical therapy within thirty days from November 29.

On January 4, 2012, Polansky directed a grievance form to the Warden. He began by saying:

> Sorry, I had no choice but to go through you first. As you know, I have been failed to be given any type of rehabilitative therapy over the past 10 years – an Eighth Amendment violation for deliberate indifference . . . .

Compl., Attach. 1 (doc. no. 1-1), at 1; see also Defs.' Mot. Summ. J., Pitman Aff., Ex. A (doc. no. 84-12), at 20 (providing the court with another copy of the same grievance form). Polansky continued by describing the focus of his grievance as inadequate care for pain in the area of his coccyx, and he concluded by requesting a pad for his shower chair, a wedge pillow for his back, "appropriate 'pain relieving' medication in regards to [his] coccyx area pain," doc. no. 1-1, at 3, and "better improved care for [his] coccyx area," id. Again, it is difficult to read that grievance form as requesting physical therapy.

On the copy of the grievance form that Pitman attached to her affidavit, the space labeled "Director's Action" bears the following notation: "forwarded to Helen Hanks 1/6/12." Doc. no. 84-12, at 22. On the copy of that form that Polansky attached to his complaint, the space labeled "Director's Action" includes a response from Hanks, dated February 17, 2012:

> Mr. Polansky, you have been seen by Pain Clinic and your Neurontin has been increased. Dr. Eppolito will meet with you again next week and will be reviewing

> your medical records. The wedge pillow has been obtained and the shower cushion is on order.

Doc. no. 1-1, at 1. Above Hanks's response, Polansky wrote: "This was sent to the Warden's office – Not Ms. Hanks." Id. And, below Hanks's response, Polansky added the following annotation:

> This is untrue. What was actually obtained is a "round" styrafoam 4 foot 'ridged' unusable and unwanted 'boat mooring 'float' "! And the shower chair cushion has been "on order" since August of last year!! C'mon Helen – Even you could be penalized –

Id. Polansky did not follow up on Hanks's response by filing a grievance with the Warden concerning physical therapy within thirty days from February 17.

Five days after he filed this action, Polansky directed a grievance form to the Commissioner. In it, he: (1) mentioned "denial of physical and/or orthopedic therapys and range of motion and etc. etc. etc.," Defs.' Mot. Summ. J., Wolcott Aff., Ex. A (doc. no. 84-15), at 3; (2) stated the following request: "I need pain relieving medication now. Not tomorrow. Not next week or next month. NOW!," id.; and (3) informed the Commissioner that he had "already filed a civil action in District Court," id. Here again, given the content of the grievance form, it is difficult to see how it could reasonably be read as a request for physical therapy.

Shower alarm. Polansky used the DOC grievance process on three occasions to express his concern over the lack of an alarm in the shower area used by inmates with disabilities. On May 14, 2011, he directed an inmate request slip to Warden Gerry in which he addressed two safety issues, including this one:

> [T]here is no safety pull chain light switch in the handicap shower. I know it's an expense you don't want to hear about but I personally have fallen out of my shower chair and had no means to alert anyone as to what happened, so I just laid there for about 10 minutes.

Defs.' Mot. Summ. J., Pitman Aff., Ex. A (doc. no. 84-12), at 6. On May 31, 2011, the Warden responded: "Comments duly noted. Matters of security are determined by Administration not inmates." Id. Polansky did not follow up on the Warden's response by filing a grievance concerning a shower alarm within thirty days of May 31.

In an inmate request slip that was directed to Warden Gerry, dated June 4, 2011, and devoted primarily to concerns over the capacity of the ice machine available to him, Polansky wrote: "P.S. How's it going with that handicap shower alarm switch?" Defs.' Mot. Summ. J., Pitman Aff., Ex. A (doc. no. 84-12), at 7. In a response dated June 8, the Warden denied Polansky's request for a new ice machine, but did not mention his query concerning a shower alarm. See id. Polansky did not

follow up on the Warden's response by filing a grievance concerning a shower alarm within thirty days of June 8.

Finally, on September 4, 2011, Polansky directed another inmate request slip to Warden Gerry in which he made the following request:

> Hey – me again! I figure the D.O.C. is spending, what . . . $6-700 an hour for a crane system to build an addition or whatever it's there for, that is only used 50% of the time at best but is still on the clock at all times. I figure if you've got that kind of cash to throw away, you should at least purchase a new heating and cooling system for the H.S.C. building because the system there now is so old, it acts like that crane in that it only "works" 50% of the time making life miserable for patients, staff, and security. And while you're at it, you should reconsider installing a safety alert system in the handicap shower area as I have fallen out of my shower [chair] in the past and laid in my own feces for some time before I was happened upon by staff by chance and now suffer "serious' anxiety, distress and apprehension when I am to take a shower (2nd notice).

Compl., Attach. 1 (doc. no. 1-1), at 17. On September 7, the Warden responded: "Received and noted." Id. Polansky did not follow up on the Warden's response by filing a grievance concerning a shower alarm within thirty days of September 7.

E. Contact Visits

For much of his incarceration, Polansky had the privilege of "contact visits," i.e., visits during which he could see family members without a barrier between himself and his

visitors. While inmates with contact-visit privileges were generally subject to strip searches after such visits, Polansky was required to remove only his shirt, due to his paralysis. On July 1, 2011, in response to a smuggling incident involving Eric Warner, another inmate confined to a wheelchair, Maj. Fouts issued a memorandum that provided, in pertinent part:

> Warden Gerry has directed that all visits for IM Eric Warner . . . be done as non-contact until further notice. This is due to our inability to effectively search him at the end of his visit sessions.
>
> Also, until further notice, I am issuing the same directive for IM Christopher Polanski.

Compl., Attach. 1 (doc. no. 1-1), at 29.

Shortly thereafter, Maj. Fouts and Warden Gerry discussed a variety of ways in which Polansky could be adequately searched after contact visits and, thus, have that privilege restored. They considered, but rejected, Polansky's request to have a correctional officer assist him with removing his pants. Their decision was based upon safety concerns, the lack of a protocol to guide correctional officers in providing that kind of hands-on assistance, and the amount of time it would take to create such a protocol. Maj. Fouts then consulted with Campbell to see whether she could work with Polansky to help him develop the strength and physical skills necessary to remove his own pants

and position himself for a strip search. In October of 2011, Polansky's contact-visit privileges were reinstated. That was made possible by a combination of things: (1) Polansky was allowed to wear a one-piece backless jumpsuit to his contact visits; (2) DOC installed grab-bars in the strip-out room to make it easier for wheelchair-bound inmates to properly position themselves for strip searches; and (3) Polansky developed the ability to position himself in a way that allowed correctional officers to effectively strip search him.

F. Polansky's Claims

Based upon the foregoing, Polansky asserts nine claims. Through the mechanism of 42 U.S.C. § 1983, he asserts: a claim under the Eighth Amendment to the United States Constitution against Dr. Englander, Campbell, and Hanks, based upon their alleged failure to provide him with any physical therapy (Count I); a claim under the Eighth Amendment against Warden Gerry based upon his alleged failure to install an alarm in the shower for inmates with disabilities (Count IV); and a claim under the First Amendment against Warden Gerry and Maj. Fouts, based upon their denial of contact visits between him and his family (Count VII). Polansky also asserts claims against DOC under two federal statutes, the Americans With Disabilities Act of 1990

("ADA"), 42 U.S.C. §§ 12101-12213, and the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796l, based upon DOC's alleged failure to accommodate his disability by: (1) installing an alarm in the shower used by inmates with disabilities (Counts V and VI); and (2) having correctional officers assist him with the strip searches it requires as a condition for contact visits (Counts VIII and IX). Finally, he asserts state-law claims against Dr. Englander, Campbell, and Hanks for: (1) medical negligence, based upon their alleged failure to provide him with any physical therapy (Count II); and (2) intentional infliction of emotional distress, also based upon defendants' alleged failure to provide him with any physical therapy (Count III). Having described Polansky's claims, the court notes that while the documents that make up Polansky's complaint are dated September 22, 2011, or January 5, 2012, the complaint was filed in this court on March 19, 2012.

Discussion

Defendants move for summary judgment on all nine of Polansky's claims. In this section, the court begins with the claims based upon the alleged failure to provide Polansky with any physical therapy, continues with the claims based upon the alleged failure to install a shower alarm, and concludes with

the claims related to the suspension of Polansky's contact visits.

A. Counts I, II, and III

Count I is a claim that Dr. Englander, Campbell, and Hanks completely denied Polansky medically necessary physical therapy, thus acting with deliberate indifference to a serious medical need, in violation of the Eighth Amendment's prohibition of cruel and unusual punishment.[2] See Report & Recommendation (hereinafter "R&R") (doc. no. 19) 14-15. Defendants move for summary judgment, arguing that Polansky: (1) has not exhausted the remedies available to him for getting the physical therapy he says he needs; (2) has not disclosed a medical expert, and cannot prove his claim without one; and (3) has actually received physical therapy. Defendants' first argument is persuasive, and dispositive of Counts I, II, and III.

According to the Prison Litigation Reform Act of 1995 ("PLRA"), "[n]o action shall be brought with respect to prison conditions under section 1983 of this title . . . by a prisoner

[2] While Polansky now says that he "has never alleged that he [n]ever received physical therapy, only the continuation of it," Pl.'s Second Obj. to Summ. J. (doc. no. 105) 17, the first page of the first attachment to his complaint includes the following statement from Polansky to the Warden: "I have been failed to be given any type of rehabilitative therapy over the past 10 years."

confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C. § 1997e(a). Claims for which administrative remedies have not been exhausted are subject to dismissal. See Medina-Claudio v. Rodríguez-Mateo, 292 F.3d 31, 36 (1st Cir. 2002).

"[T]he PLRA exhaustion requirement requires proper exhaustion." Woodford v. Ngo, 548 U.S. 81, 93 (2006). Proper exhaustion "demands compliance with [a penal institution]'s deadlines and other critical procedural rules." Id. at 90. To meet the requirement of proper exhaustion, "a prisoner must file complaints and appeals in the place, and at the time, the prison's administrative rules require." Acosta v. U.S. Marshals Serv., 445 F.3d 509, 512 (1st Cir. 2006) (quoting Pozo v. McCaughtry, 286 F.3d 1022, 1025 (7th Cir. 2002)). As for when a prisoner filing suit must have exhausted his or her administrative remedies, the language of the PLRA

> clearly contemplates exhaustion prior to the commencement of the action as an indispensable requirement [and that e]xhaustion subsequent to the filing of suit will not suffice. Cf. Booth [v. Churner], 532 U.S. [731,] 738 [(2001)] ("The 'available' 'remed[y]' must be 'exhausted' before a complaint under § 1983 may be entertained.") (emphasis added).

Medina-Claudio, 292 F.3d at 36 (emphasis added). Finally, "failure to exhaust is an affirmative defense under the PLRA." Jones v. Bock, 549 U.S. 199, 216 (2007). As such, it "must be raised and proved by the defense." Cruz Berríos v. González-Rosario, 630 F.3d 7, 11 (1st Cir. 2010) (citing Jones, 549 U.S. at 216).

Here, leaving aside the undisputed evidence that Polansky has received physical therapy and other services from a physical therapist at the prison and refused a third course of physical therapy that was prescribed for him, defendants have produced evidence that that Polansky never completed the three-step grievance process with respect to his alleged need for physical therapy. Specifically, they have produced evidence that: (1) none of the inmate request slips in which Polansky mentioned physical therapy was followed by a timely grievance to the Warden; and (2) the grievance Polansky filed with the Commissioner that mentioned physical therapy was filed after he filed this suit, see Defs.' Mot. Summ. J., Wolcott Aff., Ex. A (doc. no. 84-15), at 3, which makes that grievance ineffective for the purpose of satisfying the PLRA exhaustion requirement, see Medina-Claudio, 292 F.3d at 36.

Polansky has produced no evidence to the contrary, only generalized and unsupported allegations that: (1) he has fully complied with the DOC grievance process with respect to all of his claims, see, e.g., Pl.'s First Obj. to Summ. J. (doc. no. 101) 3-4; Pl.'s Second Obj. to Summ. J. (doc. no. 105) 1, 12, 22; and (2) prison officials have lost, misplaced, and/or discarded inmate request slips and grievance forms he has properly and timely submitted, see, e.g., Pl.'s Second Obj. to Summ. J. (doc. no. 105) 2, 17; Pl.'s Mem. of Law (doc. no. 108) 5. The conclusory allegations and unsupported speculation on which Polansky relies do not create a triable issue of fact regarding exhaustion. See Sánchez-Rodríguez, 673 F.3d at 9. While an inmate in Polansky's position might be able to ward off an exhaustion defense at summary judgment by, for example, submitting yellow copies of grievance forms to demonstrate his or her compliance with the grievance process and/or malfeasance by prison officials, Polansky has produced no such evidence. Rather, he only makes unsupported allegations that inmate request slips and grievance forms have been misplaced or intentionally discarded. That is not enough.

It is, thus, undisputed that: (1) Polansky never followed up with the Warden within thirty days after he received

responses to the three inmate request slips that mentioned physical therapy; and (2) he grieved the prison's alleged failure to provide him with physical therapy to the Commissioner, if at all, only after he filed this suit. For those reasons, Polansky's use of the grievance process was insufficient, as a matter of law, to exhaust the administrative remedies available to him with regard to physical therapy. See Medina-Claudio, 292 F.3d at 36. Accordingly, defendants have carried their burden of proving that the claim stated in Count I is unexhausted and, therefore, subject to dismissal. See id. Moreover, because the state-law claims asserted in Counts II and III "arise out of the same nucleus of operative facts as [Polansky's] viable federal claim asserting inadequate medical care based on the denial of physical therapies," R&R (doc. no. 19) 15, Counts II and III are also subject to dismissal as a result of Polansky's failure to exhaust. Accordingly, Dr. Englander, Campbell, and Hanks are entitled to judgment as a matter of law on the claims Polansky asserts in Counts I, II, and III.

B. Counts IV, V, and VI

Count IV is Polansky's claim that Warden Gerry failed to take any action to remedy the lack of an alarm system in the

shower room he uses, thus acting with deliberate indifference to a condition that poses a serious risk to his health and safety, in violation of the Eighth Amendment's prohibition of cruel and unusual punishment. See R&R (doc. no. 19) 20. Defendants move for summary judgment, arguing that Polansky: (1) has not exhausted the remedies available to him for seeking improvements to the safety of his shower room; and (2) has been provided with an emergency call device for use while he is showering. Defendants' first argument is persuasive, and dispositive of Counts IV, V, and VI.

Leaving aside the undisputed evidence that Polansky now has a device he can use to call for help if he has difficulties in the shower, it is also undisputed that he never grieved the lack of a shower alarm to the Commissioner. Thus, he never exhausted the administrative remedies available to him for resolving that issue. Because Warden Gerry has carried his burden of proving that Polansky has not exhausted the administrative remedies available to him for resolving the claim he asserts in Count IV, that claim is subject to dismissal, see Medina-Claudio, 292 F.3d at 36, which entitles the Warden to judgment as a matter of law on Count VI. In addition, because the ADA and Rehabilitation Act claims Polansky asserts in Counts V and VI are based upon

the same conduct as the Eighth Amendment claim he asserts in Count IV, DOC is entitled to judgment as a matter of law on Counts V and VI.

C. Count VII

Count VII is Polansky's claim that by denying him contact visits, Warden Gerry and Maj. Fouts violated his right to familial association, as guaranteed by the First Amendment to the United States Constitution. See R&R (doc. no. 19) 28-34. Regarding his First Amendment claim against the Warden, Polansky asks the court to "order[ ] defendants to forthwith eliminate [the] directive banning plaintiff from his contact visits until a reasonable order can be made." Compl. (doc. no. 1) 5. Regarding his First Amendment claim against Maj. Fouts, Polansky "asks the court to remove this directive [suspending his contact visits] with injunctive relief in the form of an injunction requiring forthwith treatment: 1) of plaintiff's contact visits returned." Id. at 7. The court notes that those two requests for relief appear in a portion of Polansky's complaint that bears the date September 22, 2011, and that Polansky's contact-visit privileges were restored in October of 2011.

Defendants move for summary judgment, arguing that: (1) Polansky's First Amendment claim is moot in light of the

restoration of his contact-visit privileges in October of 2011; and (2) during the time when Polansky's privileges were suspended, there was no readily available alternative that would have allowed him to have contact visits while adequately addressing the security risks posed by such visits. Polansky argues that his

> claim for prospective injunctive relief in the form of the return of his contact visitation privileges is not moot in that although defendants reinstated his contact visits in October 2011, he failed to receive any contact visits during that time and has yet to have one since as [his] family has been so maltreated, abused, and discriminated against from defendants' improper and illegal actions towards them have disengaged with and become discouraged with any further visits with plaintiff personally harming him with him suffering further anxiety, depression, and of course anger issues.

Pl.'s Second Obj. to Summ. J. (doc. no. 105) 4; see also id. at 13-14. Polansky also seems to argue that defendants should somehow be estopped from referring to the suspension of his contact visits as temporary because they never told him it was temporary at the time they imposed it. See, e.g., Pl.'s Second Obj. to Summ. J. (doc. no. 105) 4, 12, 19. The court agrees with defendants that the claim Polansky asserts in Count VII is moot.

"The doctrine of mootness enforces the mandate that an actual controversy must be extant at all stages of the review,

not merely at the time the complaint is filed." ACLU of Mass. v. U.S. Conf. of Catholic Bishops, 705 F.3d 44, 52 (1st Cir. 2013) (quoting Mangual v. Rotger-Sabat, 317 F.3d 45, 60 (1st Cir. 2003); citing Steffel v. Thompson, 415 U.S. 452, 460 n.10 (1974)) (internal quotation marks omitted). As for what makes a claim moot, the court of appeals for this circuit has explained:

> This court, employing the Supreme Court's terminology, has provided various formulations of what makes a case moot. "Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." D.H.L. Assocs., Inc. v. O'Gorman, 199 F.3d 50, 54 (1st Cir. 1999) (quoting Powell v. McCormack, 395 U.S. 486, 496 (1969)) (internal quotation marks omitted). "Another way of putting this is that a case is moot when the court cannot give any 'effectual relief' to the potentially prevailing party." Horizon Bank & Trust Co. v. Massachusetts, 391 F.3d 48, 53 (1st Cir. 2004) (citing Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992)). And, "[i]f events have transpired to render a court opinion merely advisory, Article III considerations require dismissal of the case." Mangual, 317 F.3d at 60; Libertarian Party of N.H. v. Gardner, 638 F.3d 6, 12 (1st Cir. 2011), cert. denied, 132 S. Ct. 402 (2011).

ACLU, 705 F.3d at 52-53 (parallel citations omitted). Finally, "[t]he burden of establishing mootness rests with the party invoking the doctrine." Id. at 52 (citing Conservation Law Found. v. Evans, 360 F.3d 21, 24 (1st Cir. 2004)).

Here, it is undisputed that Polansky's contact-visit privileges were restored in October of 2011. Thus, he has

already been provided all the relief he sought for his First Amendment claim, rendering that claim moot. See ACLU, 705 F.3d at 52. Because Polansky has received all the relief he sought, anything the court would have to say about his First Amendment claim would necessarily be an advisory opinion, which entitles defendants to dismissal of that claim. See id. at 52-53.

Polansky's arguments against mootness, moreover, are not persuasive. First, Polansky aruges that his claim for prospective injunctive relief is not moot because he received no contact visits while the suspension was in place. This argument makes little sense, particularly in light of the fact that Polansky does not seek damages or any form of relief other than restoration of his contact-visit privileges. Equally unavailing is Polansky's argument that his claim remains alive because, notwithstanding the reinstatement of his contact visits, members of his family have declined to visit him, due to alleged mistreatment by prison officials. Count VII is a challenge to the constitutionality of the way in which prison officials treated Polansky, not the way they treated members of his family. And, in any event, a claim that prison officials mistreated members of Polansky's family belongs to those who were allegedly mistreated, not to Polansky. Cf. Niece v.

Fitzner, 922 F. Supp. 1208, 1215-18 (E.D. Mich. 1996) (adjudicating ADA claim brought against prison by inmate's fiancée, based upon prison's failure to provide telephone service that accommodated her deafness). Based upon the foregoing, Polansky has advanced no legal basis upon which the court could find there to be a live controversy surrounding the temporary suspension of his contact visits. Without a live controversy, the claim Polansky asserts in Count VII is moot. See ACLU, 705 F.3d at 52. Because defendants have carried their burden of establishing that the claim Polansky asserts in Count VII is moot, and subject to dismissal, they are entitled to judgment as a matter of law on Count VII.

D. Counts VIII and IX

Counts VIII and IX are claims under the ADA and the Rehabilitation Act. Specifically, Polansky claims that DOC violated the "reasonable accommodation" requirements of those statutes by failing to have correctional officers physically assist him with strip searches after contact visits. See R&R (doc. no. 19) 36-38. Several of Polansky's pleadings also mention, seemingly in the context of the ADA claim he asserts in Count VIII, that DOC engaged in unlawful disability discrimination by requiring him to submit to a urine test after

every contact visit. See, e.g., Pl.'s Second Obj. to Summ. J. (doc. no. 105) 5-6, 14. But, as described in my report and recommendation, Count VIII includes no such claim, see doc. no. 19, at 36-38, so nothing Polansky has to say about urine testing is relevant to any issue before me now.

Turning then, to the claims actually before me, when Polansky's complaint is construed most liberally, the relief he seeks for the claims he asserts in Counts VIII and IX includes the relief described in the foregoing discussion of Count VII,[3] plus this: "I want the prison to return my contact visits." Compl. (doc. no. 1) 7. DOC moves for summary judgment, arguing that the accommodation Polansky says he should have received, having correctional officers help him pull down his pants to

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[3] The two requests for relief applicable to Count VII are these:

> I want the court to [issue a preliminary injunction] ordering defendants to forthwith eliminate directive banning plaintiff from his contact visits until a reasonable order can be made.
>
> . . . .
>
> Plaintiff asks the court to remove this directive [imposing a moratorium on contact visits] with injunctive relief in the form of an injunction requiring forthwith treatment: 1) of plaintiff's contact visits returned.

Compl. (doc. no. 1) 3, 5.

allow a strip search, was not reasonable under the circumstances.

While DOC does not argue mootness with respect to Counts VIII and IX, it is difficult to see how the evidence Warden Gerry and Maj. Fouts produced to establish the mootness of the claim Polansky asserts in Count VII does not also establish the mootness of the claims Polansky asserts against DOC in Counts VIII and IX. Shortly after Polansky drafted the requests for relief in his complaint, but long before he filed the complaint, all the relief he requested as a remedy for the allegedly unlawful suspension of contact visits had been provided to him.

Beyond that, to the extent that Counts VIII and IX may be construed, in light of intervening events, as claims that prison officials should accommodate Polansky's disability by having correctional officers help him remove his pants, rather than by utilizing the strip-out procedure that is currently in place, such a claim would go nowhere. In the report and recommendation that identifies the claims in this case, I relied upon a Memorandum by Judge Zobel in a case involving an ADA claim by a prisoner. In that Memorandum, Judge Zobel explained:

> A reasonable accommodation does not require the public entity to employ any and all means to make services available to persons with disabilities. Rather, a "reasonable accommodation" is one that gives

> "meaningful access" to the program or services sought. See Alexander v. Choate, 469 U.S. 287, 301 (1985).

Bibbo v. Mass. Dep't of Corr., Civ. Action No. 08-10746-RWZ, 2010 WL 2991668, at *1-2 (D. Mass. July 26, 2010) (parallel citations omitted). Here, Polansky does not argue, nor could he reasonably argue, that the strip-out procedure the prison currently uses for him does not give him reasonable access to contact visits. Moreover, to the extent that Polansky's claims are based upon a preference for a strip-out procedure other than the one the prison currently uses, that preference does not make the accommodation that DOC currently provides unreasonable. See Thomas v. Pa. Dep't of Corr., 615 F. Supp. 2d 411, 425-26 (W.D. Pa. 2009) (holding that prisoner's preference for one type of prosthesis did not render a different type of prosthesis an unreasonable accommodation so long as prosthesis provided to prisoner allowed him to access prison services).

Finally, the court cannot help but see a bit of irony in Polansky's ADA claim. It is undisputed that for nearly ten years up until the smuggling incident involving inmate Eric Warner, Polansky was given an accommodation in the form of a shirt-only strip search that allowed him to enjoy the privilege of contact visits. Unlike inmates without Polansky's disability who were required to submit to a full strip search after contact

visits, Polansky was allowed to get by with a partial strip search. All that happened here is that the accommodation Polansky once enjoyed was rescinded, for legitimate security reasons, and his contact visits were suspended until another accommodation could be devised that allowed Polansky to have contact visits while also allowing the prison to meet its security needs. The suspension of Polansky's contact visits lasted approximately three months, and was lifted long ago. The prison, it seems, has been the exact opposite of unaccommodating with respect to providing Polansky with contact visits.

The bottom line is this. DOC is entitled to judgment as a matter of law on the claims Polansky asserts in Counts VIII and IX because: (1) DOC's reinstatement of Polansky's contact visits, the only relief he seeks in those counts, renders his claims moot; and/or (2) Polansky has produced no evidence to create a triable issue concerning the reasonableness of the accommodation that has resulted in the reinstatement of his contact visits.

Conclusion

Because defendants are entitled to judgment as a matter of law on all nine of Polansky's claims, for the reasons detailed above, I recommend that Judge Barbadoro grant both of the

pending motions for summary judgment, document no. 84 and document no. 92, and direct the clerk of the court to close this case.

Any objections to this report and recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). Failure to file objections within the specified time waives the right to appeal the district court's order. See United States v. De Jesús-Viera, 655 F.3d 52, 57 (1st Cir. 2011), cert. denied, 132 S. Ct. 1045 (2012); Sch. Union No. 37 v. United Nat'l Ins. Co., 617 F.3d 554, 564 (1st Cir. 2010) (only issues fairly raised by objections to magistrate judge's report are subject to review by district court; issues not preserved by such objection are precluded on appeal).

Landya McCafferty
United States Magistrate Judge

March 25, 2013

cc: Christopher Polansky, pro se
Lynmarie C. Cusack, Esq.
Jonahtan A. Lax, Esq.